IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED CHURCH OF CHRIST OFFICE OF COMMUNICATIONS, INC., et al., Petitioners,	)	
v.	)	No. 08-3245 (and consolidated cases)
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO EMERGENCY MOTION FOR A STAY

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INTRODUCTION

The Communications Act requires each operator of a cable system with 36 or more channels to "designate" some of those channels "for commercial use by persons unaffiliated with the operator." 47 U.S.C. § 532(b)(1). In industry parlance, these designated channels are known as "leased access" channels. *See Time Warner Entertainment Co. v. FCC,* 93 F.3d 957, 968 (D.C. Cir. 1996). Congress has directed the Federal Communications Commission to "establish rules for determining maximum reasonable rates" that cable operators may charge unaffiliated programmers to lease these channels. 47 U.S.C. § 532(c)(4)(B).

Despite the FCC's prior efforts to implement this statute, the use of leased access channels has been virtually nonexistent. A recent survey showed that cable systems on average were carrying "only 0.7 leased access channels," *Leased Commercial Access*, 23 FCC Rcd 2909, 2927 (¶ 39) (2008) ("*Order*"), even though the statute contemplates that up to 15 percent of channels be devoted to leased access, 47 U.S.C. § 532(b)(1)(A)-(C). Earlier this year, the FCC concluded that its own leased access rules, which had been in effect since 1997, had stifled the development of leased access by setting unreasonably high rates. Consequently, the Commission revised its rules in an effort "to make the leased access channels a more viable outlet for programming." *Order* ¶ 39.

Several parties have petitioned for review of the Commission's *Order* adopting new leased access rules. One of the petitioners – the National Cable & Telecommunications Association ("NCTA"), the cable industry's trade association – seeks a stay of the *Order* pending judicial review, attempting to keep in place rates that the Commission has found to be unreasonably high. For the reasons discussed herein, NCTA has failed to satisfy the stringent requirements for a stay. In particular, it fails to establish a likelihood of success on the merits because most of its claims have been waived and all of its arguments are based on fundamentally erroneous premises. Accordingly, the Court should deny NCTA's stay motion.

BACKGROUND

1. As part of the Cable Communications Policy Act of 1984 ("1984 Cable Act"), Pub. L. No. 98-549, 98 Stat. 2779, Congress added section 612 to the Communications Act. That provision, which is codified at 47 U.S.C. § 532, "established leased access set-aside requirements in proportion to a [cable] system's total activated channel capacity." *Order* ¶ 4.[1] While a cable operator must set aside a certain number of channels for leased access, it "may use any unused channel capacity designated" for leased access "until the use of such channel capacity is obtained, pursuant to a written agreement, by a person unaffiliated with the operator." 47 U.S.C. § 532(b)(4).

Originally, section 612 "gave cable operators the authority to establish the price, terms, and conditions of the service on their leased access channels." *Time Warner,* 93 F.3d at 968. In the early 1990s, however, two congressional committees concluded that "permitting [cable] operators to establish the rates and terms of leased access service made little sense" because "cable operators had

[1] Depending on the channel capacity of its cable system, a cable operator could be required by section 612 to reserve up to 15 percent of its channels for leased access. *See* 47 U.S.C. § 532(b)(1)(A)-(C). A cable operator with fewer than 36 activated channels is not subject to leased access requirements. *Id.* § 532(b)(1)(D).

financial incentives to refuse access to those who would compete with existing programs." *Id.* at 968-69 (internal quotations omitted). Consequently, when Congress passed the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460, it amended section 612 to authorize the FCC to "establish reasonable terms and conditions" – including "the maximum reasonable rates" – for leased access. 47 U.S.C. § 532(c)(4)(A)(i)-(ii). Congress directed the Commission to adopt rules implementing section 612 within 180 days after the 1992 Cable Act became law. *Id.* § 532(c)(4)(B).[2]

The stated purpose of section 612 is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. § 532(a). The statute further provides that "the price, terms, and conditions" of leased access must be "at least sufficient to assure" that leased access "will not adversely affect the operation, financial condition, or market development of the cable system." *Id.* § 532(c)(1).

2. Ever since Congress empowered the FCC to set leased access rates, the Commission has consistently based those rates on the "implicit fee" that unaffiliated programmers pay to cable operators – *i.e.*, the difference between the price cable operators pay programmers to carry certain programming and the rate

[2] The D.C. Circuit rejected the cable industry's challenge to the constitutionality of the amended section 612 in *Time Warner,* 93 F.3d at 967-71.

subscribers pay cable operators to view that programming. *See ValueVision International, Inc. v. FCC,* 149 F.3d 1204, 1207 (D.C. Cir. 1998). At first, FCC rules based the maximum leased access rates "on the highest implicit fee charged any nonaffiliated programmer within the same program category." *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC Rcd 5631, 5936 (¶ 492) (1993). The Commission made clear, however, that its initial leased access rules "should be understood as a starting point that will need refinement." *Ibid.* (¶ 491).

In 1997, the Commission revised its leased access rate methodology, adopting an "average implicit fee" formula. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access,* 12 FCC Rcd 5267 (1997) ("*1997 Order*"). The agency defined the "average implicit fee" as "the average mark-up over programming costs" that cable operators charge subscribers. *Id.* at 5290 (¶ 44). It developed a formula for calculating "the average implicit fee for a full-time channel on a particular tier [*i.e.,* a bundled offering of channels] with a subscriber penetration over 50%." *Id.* at 5283 (¶ 32).

The Commission concluded that basing the maximum leased access rates on the average implicit fee, rather than the highest implicit fee, "more appropriately balances the interests of cable operators and leased access programmers." *1997 Order,* 12 FCC Rcd at 5290 (¶ 44). At the same time, the agency said that it would "continue to monitor the availability of leased access channels," and that it might "revisit this issue if it appears that the average implicit fee formula no longer reflects a reasonable rate." *Id.* at 5282 (¶ 31). The D.C. Circuit rejected various challenges to the *1997 Order* in *ValueVision,* 149 F.3d at 1210-13.

3. In June 2007, the FCC issued a notice of proposed rulemaking seeking comment on whether the leased access rules should be changed. *Leased Commercial Access,* 22 FCC Rcd 11222, 11224-25 (¶¶ 7-9) (2007) ("*Notice*"). After receiving and reviewing numerous comments, the Commission decided that a change in the leased access rate formula was warranted. Citing a recent survey of cable prices, the Commission noted that "cable systems on average carry only 0.7 leased access channels." *Order* ¶ 39. The agency attributed this "underutilization of leased access channels" to the "average implicit fee" rate formula, which had produced unreasonably high leased access rates. *Ibid.*

The Commission determined that "the average implicit fee overcompensates cable operators because it reflects the *average* value of a channel to the cable operator instead of the value of the channel replaced" by leased access programming. *Order* ¶ 41. As long as leased access rates were based on the average implicit fee, cable operators would receive "a higher return for lost channel capacity than [they] would have received if the channel was not used for leased access programming." *Id.* ¶ 42.

To correct this flaw in its methodology, the Commission decided that the maximum leased access rates should be based on the "marginal" (or lowest) implicit fee. *Order* ¶ 42. It reasoned that an economically rational cable operator would most likely accommodate leased access programming by replacing the channels on its cable system that generated the least revenue. On the basis of this assumption, the Commission concluded that the marginal implicit fee best reflected the value of the channels that cable operators would replace with leased access channels. *Ibid.*

Accordingly, in the *Order*, the Commission adopted a new formula that based the maximum leased access rate "on the net revenue of the least profitable channels voluntarily carried by the cable operators on the tier where the leased access programming will be carried." *Order* ¶ 44; *see also id.* ¶ 45 (describing the details of the new formula); *id.*, Appendix D (providing an example of a calculation under the formula). In addition, the Commission established a rate ceiling of "$0.10 per subscriber per month for any cable system" that uses the new formula to calculate the maximum leased access rate. *Id.* ¶ 48.[3]

The Commission believed that its new formula would yield "a leased access rate that will allow the [cable] operator to replace an existing channel from its cable system with a leased access channel without experiencing a loss in net revenue." *Order* ¶ 38. Nonetheless, to provide additional assurance that cable operators would receive adequate compensation for leased access, the agency allowed operators to "petition the Commission to exceed the maximum allowable leased access rates." *Id.* ¶ 49. If an operator's petition for relief presented "specific facts justifying" a leased access rate that exceeded the maximum rate prescribed by the new formula, the operator could charge "an alternative rate" that

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[3] The Commission established this rate ceiling because it was concerned that its "tier-based calculation method may … create incentives among cable operators to design programming tiers that are unaffordable for leased access programmers." *Order* ¶ 47.

"equitably balances" the operator's revenue requirements "with the public interest goals of the leased access statute." *Ibid.*

The Commission also took further steps "to make the leased access carriage process more efficient" by adopting "new customer service standards." *Order* ¶ 12. The new standards "are designed to ensure that leased access programmers are not discouraged from pursuing their statutory right" to use leased access channels. *Ibid.* Under these standards, cable operators must provide prospective leased access programmers with certain information about leased access channels within three business days of a request for information. *Ibid.*

ARGUMENT

In assessing whether the extraordinary remedy of a stay is warranted, the Court must consider four factors: "1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies." *Nader v. Blackwell,* 230 F.3d 833, 834 (6th Cir. 2000). None of these factors supports a stay here.

I. NCTA IS NOT LIKELY TO PREVAIL ON THE MERITS

To obtain a stay, NCTA must show "more than the mere possibility of success on the merits." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991) (internal quotations omitted). "Ordinarily the party seeking a stay must show a strong or substantial likelihood of success." *Ohio ex rel. Celebrezze v. NRC,* 812 F.2d 288, 290 (6th Cir. 1987). NCTA has made no such showing. Indeed, as we explain below, NCTA has waived most of its claims by failing to exhaust administrative remedies, and those claims in any event are based on fundamentally erroneous premises.

1. NCTA contends that the FCC's new rate formula violates the leased access statute and disregards prior interpretations of the law. Motion at 7-11. NCTA cannot raise those claims here because no party presented them to the Commission before the *Order* was issued. "[Section] 405 of the Communications Act precludes judicial review of a claim not previously raised to the FCC." *Cellnet Communications, Inc. v. FCC,* 149 F.3d 429, 442 (6th Cir. 1998).

If NCTA wished to preserve its arguments for judicial review, it was required to present them to the FCC in a petition for reconsideration before coming to court. *See* 47 U.S.C. § 405(a). This is true even when a party first becomes aware of the issues in question only after the FCC releases its order. As the D.C. Circuit has explained, "even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the Commission before it may seek judicial review." *Qwest Corp. v. FCC,* 482 F.3d 471, 474 (D.C. Cir. 2007) (quoting *In re Core Communications, Inc.,* 455 F.3d 267, 276-77 (D.C. Cir. 2006)).[4]

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[4] Some commenters broadly argued before the FCC that *any* rule change that resulted in lower leased access rates would violate the statute. *See, e.g.,* Time Warner Ex Parte Letter, Nov. 20, 2007, at 13-14. Such general assertions are insufficient to preserve NCTA's statutory claim with respect to the specific formula adopted by the FCC, especially since the Commission has created a "safety valve" that allows cable operators to justify the assessment of higher rates. Section 405 has not been satisfied here because the FCC did not receive an opportunity to address "the identical issue that [NCTA] now wishes to present to

Even if NCTA's statutory arguments were not procedurally barred, they are baseless. NCTA principally contends that "the FCC abandoned the statutory directive" to assure that cable systems are not adversely affected by leased access rates. Motion at 9. To the contrary, the Commission – consistent with its statutory mandate – reasonably determined that its new rate formula would "not adversely affect the operation, financial condition, or market development" of cable systems. *Order* ¶ 38 (quoting 47 U.S.C. § 532(c)(1)).

Citing footnote 122 of the *Order,* NCTA claims that the *Order* "disregard[ed] ... whether cable operators suffer a loss in revenue." Motion at 9. But footnote 122 refutes rather than supports NCTA's argument. In that footnote, the Commission said that it did "not believe" that cable operators would incur "*any* loss in net revenue" under the new rules. *Order* at n.122 (emphasis added). The agency based this conclusion on its reasonable prediction that an economically rational cable operator, "faced with a requirement to free up a channel for leased access," would likely "elect to replace one of the channels with the lowest implicit fee" (*i.e.,* a channel that produces little or no revenue for the cable system). *Id.* ¶ 42. This reasonable predictive judgment – which comports with basic economic principles – is entitled to considerable deference. *Cellnet,* 149 F.3d at 441-42.[5]

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the court." *See Mission Broadcasting Corp. v. FCC,* 113 F.3d 254, 262 (D.C. Cir. 1997) (internal quotations omitted).

[5] In any event, the Commission reasonably interpreted section 612 to permit leased access rates that produce a minimal loss in cable operators' revenues, so long as leased access does not "materially affect the financial health of a cable system." *Order* at n.122. The agency reasoned that a small loss in revenues might "not adversely affect the operation, financial condition, or market development of the

Relying entirely on declarations prepared *after* release of the *Order*, NCTA complains that the new formula reduces rates "to near zero." Motion at 9. But even assuming that this is correct, there is no reason to believe that the new rates will reduce cable operators' net revenues. The Commission sensibly presumed that rates based on the marginal implicit fee provide "the most reasonable approximation of the revenue which is forgone when a cable operator carries leased access programming" because the operator is most likely to replace its "marginal networks, including those currently earning no license fee." *Order* ¶ 49. If a programmer is unable to collect any fee from a cable operator for a particular channel, that channel is not likely to be producing much revenue for the cable system. On the basis of that common sense proposition, the Commission reasonably found that the new formula "will allow [a cable] operator to replace an existing channel from its cable system with a leased access channel without experiencing a loss in net revenue." *Id.* ¶ 38.

Moreover, to provide further assurance that "no unreasonable financial burden is put on any cable operator," the Commission permitted operators "to exceed the maximum allowable leased access rates" if they could provide the FCC with "specific facts justifying" a higher rate for their cable systems. *Order* ¶ 49. This "safety valve" procedure is an integral part of the Commission's *Order* and

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cable system." *Ibid.* (quoting 47 U.S.C. § 532(c)(1)). Nothing in the D.C. Circuit's *ValueVision* decision forecloses that reasonable reading of the statute.

ensures that leased access rates will not adversely affect cable systems in any manner that would violate section 612.[6]

NCTA also argues that the Commission departed from its prior leased access policy without explaining its "change in course." Motion at 11. That assertion, like NCTA's statutory arguments, was never presented to the Commission, so it is not properly before the Court. *See* 47 U.S.C. § 405(a); *Cellnet,* 149 F.3d at 442. In any event, the claim is unfounded. The Commission acknowledged its change in policy and fully explained why it was shifting to a "marginal fee" formula for setting leased access rates. *See Order* ¶¶ 38-42

When the agency adopted an "average fee" formula in 1997, it made clear that it might later modify its approach "if it appears that the average implicit fee formula no longer reflects a reasonable rate." *1997 Order*, 12 FCC Rcd at 5282 (¶ 31). In this proceeding, the FCC found evidence that the "average fee" approach was yielding unreasonably high rates, "resulting in an underutilization of leased access channels." *Order* ¶ 39. The agency reasonably determined that the average implicit fee generally "overcompensates cable operators because it reflects the *average* value of a channel to the cable operator instead of the value of the channel replaced." *Id.* ¶ 41. Under the average fee formula, cable operators were obtaining

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[6] The cable rate regulations that the D.C. Circuit upheld in 1995 featured a similar "safety valve": a "cost-of-service option" that allowed cable operators to submit cost data to justify a higher rate than the one prescribed by the FCC's rate formula. The court found that this "safety valve ... ensures that every cable operator will be able to recover its reasonable costs." *Time Warner Entertainment Co. v. FCC,* 56 F.3d 151, 186 (D.C. Cir. 1995), *cert. denied,* 516 U.S. 1112 (1996).

"a higher return for lost channel capacity than the value [they] would have received if the channel was not used for leased access programming." *Id.* ¶ 42.

In light of these findings, the Commission decided to adopt a new rate formula that "more appropriately balanc[es] the interests of cable operators and leased access programmers." *Order* ¶ 42. The FCC's new rules "base the leased access rate on the net revenue of the least profitable channels voluntarily carried by the cable operators on the tier where the leased access programming will be carried." *Id.* ¶ 44. In the Commission's reasoned judgment, the rates produced by this formula provide "the most reasonable approximation of the revenue which is forgone when a cable operator carries leased access programming." *Id.* ¶ 49. The agency therefore concluded that the new formula would offer "more affordable opportunities for programmers without creating an artificially low rate." *Id.* ¶ 41.

NCTA is wrong to suggest that the new formula represents a dramatic change in course. Over the years, the FCC has consistently used an "implicit fee" approach to set leased access rates. At first, it based the rates on the highest implicit fee. It later switched to an "average implicit fee" formula. Now it has decided to use the implicit fee of the least valuable channels to calculate leased access rates. This methodology is not significantly different from the agency's previous "implicit fee" formulas.

NCTA claims that the "marginal fee" formula is inconsistent with past FCC practice because it assigns a value to each channel. Motion at 10. When it adopted this new methodology, the FCC acknowledged that it was "not possible to directly observe the revenue per subscriber a cable operator earns from carrying an individual channel included in a tier." *Order* ¶ 43. Nonetheless, to calculate rates under the marginal fee formula, the Commission developed a reasonable method to "approximate the revenue earned" by particular channels on a tier. *Ibid.* While NCTA seems to fault the Commission for adopting a formula that relies on approximations, the previous "implicit fee" formulas were also based on estimates. Moreover, the courts have long recognized that "agency ratemaking is far from an exact science." *Time Warner,* 56 F.3d at 163. As long as the new formula sets rates "within a zone of reasonableness," the Court must uphold the FCC's methodology. *Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968) (internal quotations omitted).

2. NCTA asserts that "the FCC based the new rate formula on assumptions that were inaccurate and had no basis in the record." Motion at 11. Because no one challenged the agency's assumptions during the administrative proceeding and NCTA did not petition for reconsideration, it cannot challenge those assumptions here. *See* 47 U.S.C. § 405(a); *Cellnet,* 149 F.3d at 442. In any event, contrary to NCTA's contention, the Commission had a reasonable basis for the assumptions it made.

In particular, the Commission reasonably assumed that a cable operator would most likely drop "one of the channels with the lowest implicit fee" to make room for a leased access channel. *Order* ¶ 42. This is an economically rational assumption. A profit-maximizing cable operator will accommodate leased access by replacing its "marginal" channels – "the least profitable channels voluntarily carried" on its cable system. *Id.* ¶ 44.

Citing several extra-record declarations from cable company officials, NCTA argues that decisions about which channels to replace are based on various factors that are not always related to the channels' implicit fees. Motion at 12. The record, however, contained no evidence to that effect. In the absence of any such evidence, it was entirely reasonable for the FCC to assume that channels with the lowest implicit fees would be the first ones displaced by leased access channels. "Because agency ratemaking is far from an exact science," the FCC may permissibly base its rates on economically plausible assumptions. *See, e.g., Time Warner,* 56 F.3d at 163, 166-68 (for purposes of setting cable rates, the FCC could reasonably assume that the similarity in rates charged by two cable systems serving the same area could be the result of collusion or coordinated pricing).

NCTA also takes issue with a footnote in the *Order* in which the FCC said that when a programming contract specifies a single rate for a bundle of channels, "the fee in the contract shall be allocated in its entirety to the highest rated network in the bundle." *Order* at n.137. NCTA contends that nothing in the record justifies this allocation, which assigns "a value of $0 to all of the other networks." Motion at 12. But NCTA raised no objection to this allocation in a petition for reconsideration before it petitioned for review of the *Order*, so its claim is waived. 47 U.S.C. § 405(a); *Cellnet,* 149 F.3d at 442. In any event, in other FCC proceedings, cable operators have complained about "the practice of programmers to tie marquee programming, such as premium channels or regional sports programming, with unwanted, or less desirable, programming." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 22 FCC

Rcd 17791, 17862 (¶ 119) (2007). Among other things, the Commission has found evidence that programmers "require carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming." *Ibid.*[7] In light of this evidence, it was reasonable for the FCC to assume that cable operators place little or no value on many of the channels that they purchase as part of a bundle.

To the extent this presumption is not true with respect to an individual cable operator, the operator can rebut the presumption and gain FCC approval to charge a higher rate. As noted above, if an operator can "present specific facts justifying" a different allocation of revenues among its bundled channels, it can use the adjustment process to obtain authorization to charge "an alternative rate" that exceeds the rate prescribed by the marginal fee formula. *Order* ¶ 49.

3. Finally, NCTA claims that the FCC failed to provide adequate notice of the rules it adopted. Motion at 13-15. This argument lacks merit. The APA requires notice of "either the terms or substance of the proposed rule *or a description of the subjects and issues involved.*" 5 U.S.C. § 553(b)(3) (emphasis added). The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved." *Nuvio Corp. v. FCC,* 473 F.3d 302, 310

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[7] In response to a rulemaking notice issued in another proceeding in October 2007, several parties have recently submitted additional evidence of these practices to the Commission. *See, e.g.,* Comments of American Cable Association, MB Docket No. 07-198, Jan. 3, 2008, at 5-6 ("When dealing with small and medium-sized cable companies, owners of 'must have' satellite channels almost invariably tie or bundle those channels with less desired (or *un*desired) channels.").

(D.C. Cir. 2006) (internal quotations omitted). The notice that launched this proceeding satisfied that standard. It specifically solicited "comment on the Commission's rate formula for leased access," and it invited commenters who sought modifications to the formula to propose "specific methodologies that the Commission should consider" as alternatives. *Notice,* 22 FCC Rcd at 11225 (¶ 8). Several commenters urged the Commission to change its rate formula, contending that rates were too high. *See Order* ¶¶ 39-41. In response to these comments, the Commission adopted a marginal fee formula for setting leased access rates.

The notice in this case also posed a series of questions about whether the leased access statute was being effectively implemented. Among other things, the notice asked: "To what extent are [programmers] able to use the set-aside channels? ... Are cable operators responsive to [programmers'] requests [for rate information]? When they respond, do they include all required information?" *Notice,* 22 FCC Rcd at 11224-25 (¶ 7). In response to these queries, several commenters complained that "poor customer service standards" – including cable operators' lengthy delays in responding to information requests – were "dissuading [programmers] from pursuing their statutory right to designated commercial leased access channels." *Order* ¶ 10. The Commission addressed these complaints by adopting new customer service standards. Under these standards, cable operators must provide prospective leased access programmers with certain information within three business days of a request for information. *Id.* ¶ 12.[8]

In light of the issues described by the notice, NCTA cannot seriously claim that the notice "provided no indication that the FCC was considering substantive changes to the existing rules, let alone a reversal of agency policy." Motion at 5. The rules challenged by NCTA "did not embrace any major subjects that were not described in the notice." *Chrysler Corp. v. Department of Transportation,* 515 F.2d 1053, 1061 (6th Cir. 1975). Those rules were a "logical outgrowth" of the notice. *See Covad Communications Co. v. FCC,* 450 F.3d 528, 548-49 (D.C. Cir. 2006). The APA requires nothing more.

II. NCTA HAS NOT ESTABLISHED IRREPARABLE HARM

Even if NCTA could demonstrate a likelihood of success on the merits, it would not be entitled to a stay because it has not established that its members would be irreparably harmed without one. The "basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Friendship Materials, Inc. v. Michigan Brick, Inc.,* 679 F.2d 100, 103 (6th Cir. 1982) (quoting *Sampson v. Murray,* 415 U.S. 61, 88 (1974)). In assessing whether a party seeking a stay has made a sufficient showing of irreparable harm, this Court weighs three factors: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel.*

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[8] NCTA's sole challenge to the customer service rules is a claim of inadequate notice. Thus, if the Court does not find that claim persuasive, there is no basis for staying the customer service rules.

Celebrezze, 812 F.2d at 290. The harm alleged "must be both certain and great, rather than speculative or theoretical." *Ibid.* "In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again." *Ibid.* Under this demanding standard, NCTA has failed to demonstrate any harm that would justify a stay of the *Order*.

NCTA asserts that cable operators will suffer irreparable economic and competitive harm without a stay because they will face "a flood" of requests for leased access channels once the FCC's new rules take effect. Motion at 15-18. NCTA bases this wholly speculative claim on the premise that the *Order* will *force* cable operators "to make leased access channels available *for free*." *Id.* at 15 (emphasis added). That premise is incorrect. Even if the FCC's new formula sets rates at or near zero, operators may charge higher rates if they can "present specific facts justifying" those rates. *Order* ¶ 49.

In any event, NCTA offers no concrete evidence to substantiate its claim that the *Order* will spur a sudden surge in requests for leased access channels. Thus, NCTA is only speculating when it asserts that cable operators will have to "devote hundreds of thousands of dollars and countless hours" to produce the materials that the *Order* requires them to provide to prospective leased access programmers. Motion at 18.

NCTA also complains that the *Order*'s customer service standards will require cable operators to disclose "highly sensitive competitive business data" to persons requesting leased access information. Motion at 18. Nothing in the *Order*, however, prevents operators from requiring persons who request such information to execute a reasonable non-disclosure agreement as a condition of obtaining the information. Agreements of this sort should adequately guard against the disclosure of commercially sensitive information to competitors.[9]

In addition, in two paragraphs, NCTA tries to establish irreparable harm by alleging that the *Order* violates the First Amendment rights of cable operators and program networks. Motion at 18-19. To demonstrate irreparable First Amendment harm, however, NCTA must first show that it is likely to prevail on its constitutional claim. *See Bonnell v. Lorenzo,* 241 F.3d 800 (6th Cir.), *cert. denied,* 534 U.S. 951 (2001). NCTA has not even attempted to do so: There is no mention of a First Amendment argument in the portion of NCTA's stay motion that attempts to establish a likelihood of success on the merits. *See* Motion at 7-15. This omission is not surprising, given that the D.C. Circuit has already rejected the cable industry's First Amendment challenge to the leased access statute. *Time Warner,* 93 F.3d at 967-71. And as the Commission has explained, the new leased access rules do not violate the First Amendment. *Order* ¶¶ 71-72.

Lastly, NCTA asserts that program networks will suffer "unrecoupable losses in license fees and advertising revenues" and "permanent damage to customer relationships" if the new leased access rules are not stayed. Motion at

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[9] A reasonable agreement could not preclude leased access programmers from using any information provided by cable operators in complaint proceedings before the FCC. *See Order* ¶¶ 62-65 (prescribing the use of protective orders to safeguard competitively sensitive information that is subject to discovery in leased access complaint proceedings).

19. Those claims, like NCTA's other assertions of harm, are based on sheer speculation. Because NCTA has not offered any proof of irreparable injury, it has not shown that a stay is warranted.

III. THE EQUITIES WEIGH AGAINST A STAY

A stay of the *Order* would harm leased access programmers. The *Order* adopted new rules "to promote the goals of leased access by providing more affordable opportunities for programmers." *Order* ¶ 41. A stay would deprive programmers of the benefits of more affordable leased access.

A stay would also conflict with the public interest in a leased access system that properly balances the competing interests of cable operators and leased access programmers. When (as in this case) Congress has directed an agency to "devise methods of regulation capable of equitably reconciling diverse and conflicting interests," the agency's ratemaking judgments are entitled to substantial deference. *See Ohio Power Co. v. FERC,* 668 F.2d 880, 886 (6th Cir. 1982) (quoting *Permian Basin,* 390 U.S. at 767). The FCC has reasonably determined that its new leased access rules "more appropriately balanc[e] the interests of cable operators and leased access programmers" than its current rules do. *Order* ¶ 42. A stay would keep in place the existing rules, which have stunted the growth of leased access for the past decade by setting unreasonably high rates. There is no good reason for the Court to postpone implementation of the new rules, which are designed "to make the leased access channels a more viable outlet for programming." *Id.* ¶ 39.

CONCLUSION

For the foregoing reasons, the Court should deny NCTA's motion for stay.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
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FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

Certificate Of Service

I, Shirley E. Farmer, hereby certify that the foregoing "Opposition of Federal Communications Commission to Emergency Motion for a Stay" was served this 2nd day of May, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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